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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 2008

TODD MITCHELL
Petitioner,

vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the Texas Ninth Court of Appeals at Beaumont, Texas

---

PETITION FOR WRIT OF CERTIORARI

Scott Pawgan
300 W. Davis, Ste 540
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Telephone: (936) 756-8241

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Was the Trial Court's denying Petitioner's proposed objection to the proposed jury charge an abuse of discretion by the trial court and in contradiction to this Court's holding in Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)

LIST OF PARTIES TO THE PROCEEDING

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2. Repsondent: The State of Texas

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(contained in the Appendix to this Petition)

i. (a) Opinion of Texas Ninth Court of Appeals, Delivered March 20, 2008 affirming Petitioner's civil commitment as a sexually violent predator pursuant to chapter 841 Texas Health & Safety Code.

(b) Order from the Texas Supreme Court showing refusal of Petitioner's petition for review by the Texas Supreme Court on September 26, 2008.

No._____

IN THE

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OCTOBER TERM 2007

TODD MITCHELL
Petitioner,

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STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the Texas Ninth Court of Appeals at Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner Todd Mitchell respectfully petitions the Court for a writ of certiorari to review the Texas Ninth Court of Appeals' affirmation of Petitioner's civil commitment as a sexually violent predator pursuant to chapter 841 Texas Health & Safety Code.

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

i. Date of Order Sought to be Reviewed. The Texas Supreme Court Order September 26, 2008 denying petition for review of the opinion delivered March 20, 2008 by the Ninth Court of Appeals, Beaumont, Texas affirming Petitioners civil commitment as a sexually violent predator pursuant to chapter 841 Texas Health & Safety Code.

ii. Rehearing. No motion for rehearing was filed.

iii. Statement Regarding Rule 12.5. No reliance on Rule 12.5 is made.

iv. Statutory Provision Believed to Confer Jurisdiction. 28 U.S.C.A. § 1257(1) (West 2001).

v. Statement Regarding Rule 29.4(b) & (c). Rule 29.4(b) & (c) do not apply to this Petition.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Under the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., amend. XIV (West 2001)

Under the Fourteenth Amendment to the United States Constitution,

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST., amend. XIV (West 2001).

STATEMENT OF THE CASE WITH MATERIAL FACTS, AND BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The case at trial for this appeal was a petition to civilly commit Petitioner as a sexually violent predator pursuant to Chapter 841, Texas Health and Safety Code. (See Exhibit J attached). The Honorable P.K Reiter, Senior Judge, was sitting by assignment and presided over the trial of the underlying case.

Petitioner was initially found to be indigent and had State Counsel for Offenders appointed to represent Petitioner. (CR, 2) State Counsel for offenders did not designate an expert to testify on Petitioner's behalf. At this time the Petitioner's family agreed to pay for a privately retained

attorney to represent Petitioner. (RR Vol. 5, pages 5 and 10) This removed Petitioner from indigent status making Petitioner ineligible for representation from State Counsel for Offender's. (CR, 74-83)

Petitioner contacted Habern, O'Neil Buckley and Lang to represent Petitioner in his defense of the suit to have Petitioner civilly committed as a sexually violent predator pursuant to Chapter 841 of the Health and Safety Code. August 9, 2006, Petitioner retained the undersigned attorney. The undersigned attorney on that day filed a motion to substitute as counsel. (CR, 71-72) August 9, 2006 was after the scheduling order's deadline for Petitioner to file an expert witness designation. (CR, 18-19)

On August 17, 2005, the Court initially denied the motion to substitute filed on August 9,

2006. (CR, 2) Petitioner had to file a motion to reconsider the motion to substitute counsel. (CR, 74-83) The Court on September 25, 2006 ruled on the motion to reconsider the motion to substitute, granting the motion and signing the order allowing State Counsel for Offenders to withdraw and making undersigned counsel the sole counsel of record for Petitioner. (CR, 83).

On September 25, 2006, Petitioners new attorney filed on behalf Petitioner a designation of expert, designating Dr. Daneen Milam as an expert witness for Petitioner. (CR, 100-106) This designation was done on the very day the order finalizing Petitioner's attorney's substitution into the case as counsel of record. (CR, 83) September 25, 2006, was also the day that arrangements were finalized to retain Dr. Milam. (RR, Vol. p.6)

The State filed a motion to strike Dr. Milam

as an expert witness based solely upon the fact Dr. Milam was designated after the deadline to designate an expert witness. (CR, 107-109) Ignoring the facts that Petitioner's prior counsel neglected to file an expert designation and Petitioner's new attorneys were not retained until after the deadline had passed, making it impossible for the undersigned attorney to timely designate an expert, the Court struck Dr. Milam as an expert. (CR, 110).

During the course of investigation, Petitioner, through his counsel was able to locate and interview two of Petitioner's alleged victims in the case, Billy McMillan and Nicolas Winquest. These individuals were confined in the Texas Department of Criminal Justice. (CR, 111-113 and 115-117). Petitioner timely filed and had signed applications for bench warrants to secure the two

witnesses appearance at trial. (CR, 111-114 and 115- 118). Those bench warrants were not executed by the Montgomery County Sheriff Department. (C.R. 119-122 and 123-126).

On the day of trial Petitioner moved for a continuance based upon: 1. Unavailability of witnesses; 2. Subpoenaed documents not retuned; 3. Filing a Writ of Mandamus and 4. Lack of communication between counsel and client. (CR, 127). The Trial Court denied the motion for continuance.

At the conclusion of evidence in the trial, the Court's proposed and eventual jury charge included just a broad form question. Specifically, the only question posed to the jury in the jury charge was:

> Do you find that Todd Mitchell suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence

(C.R. 154-158) Petitioner objected to the proposed jury instruction and proposed an alternate two question jury. (C.R. 151-153). Specifically, Petitioner wanted a two question instruction proposed to the jury as follows:

ARGUMENT FOR ISSUE ONE

1. Was the Trial Court's denying Petitioner's proposed objection to the proposed jury charge an abuse of discretion by the trial court and in contradiction to this Court's holding in Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)?

In civil commitment of sexually violent predator cases, the United States Supreme Court determined "there must be proof of serious difficulty in controlling behavior. Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). To allow an instruction that did not encompass lack of control would violate an

individual's due process. Id.

In this case, the broad form question, presented to the jury and approved by the Texas Courts, In re Almaguer, 117 S.W.3d 500, 505-06 (Tex. App.--Beaumont 2003, pet. denied); see also In re Commitment of Browning, 113 S.W.3d 851, 862-63 (Tex. App.--Austin 2003, pet. denied), reduces the State of Texas' burden in Texas Civil Commitment cases to prove that a respondent cannot control his behavior as required by this Court in Crane.

The State's own closing argument in this case, that the State only "ha[d] the burden of proving beyond a reasonable doubt that [Petitioner] has a **behavior abnormality**. And we have done just that," (R.R. – Vol. 8, P. 139 – emphasis added) shows that the broad form jury instruction allowed by Texas allows the State to

ignore the constitutionally mandated requirement that the State prove a Respondent in a Texas Civil Commitment trial be proven to have serious difficulty in controlling behavior before the Respondent is Civilly committed.

In addition, in the instant case, the broad form of the question the jury was asked to answer in this case denied Petitioner a proper submission to the jury on one of the contested fact issues before the jury, specifically, will Petitioner engage in predatory acts that would constitute a future dangerousness on behalf of the jury.

Finally, in Texas the proposed two part question charge would be less confusing to a jury. The two part charge would show more clearly and precisely to the jury that there are two distinct elements that must be proved beyond a reasonable doubt to civilly commitment an individual in

Texas as a sexually violent predator. First, is there a behavior abnormality, and second, can a Respondent in a Texas Civil Commitment Trial control his behavior so as not to engage in predatory acts of sexual violence.

The broad form question jury charge allowed in Petitioner's case and Texas violates Petitioner's due process rights as this Court held in Crane and mandates a reversing of Petitioner's judgment as a sexually violent predator and remanding Petitioner's case as a new trial.

CONCLUSION

For the reasons set forth above, Petitioner Todd Mitchell prays that a writ of certiorari issue to review the decision of the Texas Ninth Court of Appeals and the courts below.

Respectfully Submitted,

Scott Pawgan
300 W. Davis, Ste 540
Conroe, TX 77301
Telephone: (936) 756-8241

Attorney for Petitioner

No._____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 2005

TODD MITCHELL
Petitioner,

vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the Texas Ninth Court of Appeals at Beaumont, Texas

PROOF OF SERVICE

I, Scott Pawgan, presently a member of the Bar of this Court, swear on this the 26th day of December, 2008, pursuant to Supreme Court Rules

29.3 and 29.4, I have served three copies of each of the above Petition for Writ of Certiorari on the party required to be served, by depositing a container enclosing the above documents in a United States Mail receptacle with sufficient postage for first class delivery prepaid, properly addressed to:

Heather White
Special Prison Prosecution
Unit - Civil
3444 State Hwy 75N, Ste.
100
Huntsville, TX 77320

Scott Pawgan

No._____

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Respondent.

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 1864 words, excluding the parts of the

petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 23 day of December, 2008.

Scott Pawgan

No._____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 2008

TODD MITCHELL
Petitioner,

vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the Texas Ninth Court of Appeals at Beaumont, Texas

APPENDIX

As listed earlier, this appendix contains copies of

the following documents, in this order:

1. Opinion of Texas Ninth Court of Appeals, Delivered March 20, 2008 affirming Petitioner's civil commitment as a sexually violent predator pursuant to chapter 841 Texas Health & Safety Code.
2. Order from the Texas Supreme Court showing refusal of Petitioner's petition for review by the Texas Supreme Court on September 26, 2008

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-07-002 CV

IN RE COMMITMENT OF TODD MITCHELL

On Appeal from the 221st District Court

Montgomery County, Texas

Trial Cause No. 06-06-05283 CV

MEMORANDUM OPINION

The State filed a petition seeking the involuntary civil commitment of Todd Mitchell. See Tex. Health & Safety Code Ann. §§ 841.001-.150 (Vernon 2003 & Supp. 2007). Mitchell had been convicted of five offenses of sexual assault of a child and one offense of indecency with a child, and was scheduled for release from prison. In this proceeding, a jury determined that Mitchell is a sexually violent predator. See Tex. Health & Safety Code Ann. § 841.003 (Vernon 2003). The trial court signed a civil commitment order. Mitchell appeals the order and presents four

issues for review.

In issue one, Mitchell argues the trial court abused its discretion in denying his continuance motion. He filed the motion on the day trial commenced. One of the grounds was unavailability of witnesses. A week before trial, Mitchell filed applications for bench warrants to secure the attendance of two inmate witnesses at trial. The trial court granted the requests for bench warrants. The officer's hand-written statement on each warrant indicated the officer was "unable to pick up" the witnesses. In his continuance motion, Mitchell argued that the two men were material witnesses "to the issue of whether Todd Mitchell is a sexually violent predator and is likely to reoffend." The motion asserted Mitchell's attorney used due diligence to procure the testimony of the witnesses through his application for bench warrants.

At the hearing on the continuance motion, the State's attorney argued as follows:

Your Honor, opposing counsel has known about these witnesses from the start. They're actually Mr. Mitchell's victims. If they were so crucial to this case, then opposing counsel should have made arrangements for them to be here at an earlier time. Opposing counsel didn't file a bench warrant until last week, which is a week before trial and just a couple days before the Thanksgiving holiday. The holidays were not a surprise to anybody. Opposing counsel knew that this trial was set the week after Thanksgiving.

Mitchell's attorney explained the timing was in keeping with the typical practice in the county of filing bench warrants seven days prior to trial. He also described his efforts to locate the witnesses and explained why he did not depose them:

[W]e hired investigators to try to locate these individuals. . . . When we were finally able to locate and interview [them] to find out if they would testify, it was after the October 13th discovery deadline. I could have tried to notice them for deposition, but I have a strong feeling that the State would have objected that it was outside of the discovery deadline, and the only way to secure their testimony would be to bench warrant them here . . . .

After hearing counsel's arguments, the trial court noted Mitchell's attorney was in a firm with four other attorneys, one of whom had worked for the State Counsel for Offenders as one of the first lawyers involved in trying sexually violent predator cases. In denying the motion, the trial judge stated that defense counsel could have "sought an expedited deposition of these . . . convict witnesses," and that "[a]ll [defense counsel] had to do was ask the Court to grant additional time to dispose of those witnesses under the special circumstances."

Rules 251 and 252 of the Rules of Civil Procedure govern motions for continuance. See Tex. R. Civ. P. 251, 252. Rule 251 provides the trial court shall

not grant a continuance "except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law." Tex. R. Civ. P. 251. Rule 252 provides:

If the ground of such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony cannot be procured from any other source; and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and also state that the continuance is not sought for delay only, but that justice may be done; provided that, on a first application for a continuance, it shall not be necessary to show that the absent testimony cannot be procured from any other source.

An appellate court will not reverse a judgment based on a denial of a motion for continuance absent a clear abuse of discretion. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002) (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)). "A trial court 'abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'" Id. (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)).

The record reveals that retained counsel, who appeared as Mitchell's attorney at an August hearing, was appointed by written order in late

September. Mitchell did not request bench warrants on the two witnesses until November 20, 2006. The absence of a material witness is sufficient cause only if due diligence is used to procure the witness's testimony. *Fritsch v. J. M. English Truck Line*, 151 Tex. 168, 246 S.W.2d 856, 858 (1952). Counsel had time to investigate prior to one week before trial and could have requested a continuance prior to the start of trial. See *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 526-27 (Tex. App.--Houston [1st Dist.] 1994, no writ) (Attempted service only nine days before trial does not indicate due diligence.). Mitchell failed to show why the absent witnesses' testimony could not have been taken by deposition by his prior attorney, or why his new counsel gave no notice for a deposition. See *Daugherty v. Jacobs*, 187 S.W.3d 607, 619 (Tex. App.--Houston [14th Dist.] 2006, no pet.). The scheduling order set the discovery deadline for October 13, 2006. The trial court did not abuse its discretion in denying Mitchell's motion for continuance.[1]

In issue two, Mitchell argues the trial court abused its discretion in striking his expert-witness designation. See *Cunningham v. Columbia/St. David's Healthcare Sys., L.P.*, 185 S.W.3d 7, 13 (Tex. App.--Austin 2005, no pet.) (Rule 193.6 and abuse of discretion standard). Under Rule 193.6 of the Texas Rules of Civil Procedure, the evidence from a late-designated witness will be excluded unless the court finds "(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not

unfairly surprise or unfairly prejudice the other parties." Tex. R. Civ. P. 193.6(a)(1),(2). Mitchell had the burden of establishing good cause or the lack of unfair surprise or unfair prejudice. See Tex. R. Civ. P. 193.6(b). The trial court found neither.

The July 21, 2006, deadline for the expert-witness designation passed during the period that the State Counsel for Offenders represented Mitchell. At the August 16, 2006, hearing the trial court allowed retained counsel to enter an appearance as Mitchell's attorney and signed an order recognizing the substitution of counsel on September 25, 2006. Even before the trial court signed the order, Mitchell's retained counsel acted as counsel by filing a motion to dismiss the State's petition, which the trial court denied. On September 25, 2006, more than two months after the due date, counsel filed the expert-witness designation. On appeal, Mitchell argues he had "no choice in or control over" his first attorney, [2] and appointed counsel's failure to designate an expert witness should not prejudice him. He asserts his retained counsel made a designation as soon as practicable after the trial court allowed the substitution of counsel. Mitchell also argues the State was not unfairly surprised or prejudiced by the late designation of an expert, because retained counsel designated the witness two months before trial.

The State filed a motion to strike the expert-witness designation. Mitchell's attorney did not file a response or a motion requesting an extension of time. At the hearing on the State's motion,

Mitchell's attorney referenced the scheduling order and argued the trial court had discretion to "change that scheduling order in fairness to both parties." The trial court ruled as follows:

But I'm faced simply with the issue this morning of whether or not the designation in October of Dr. Milam is effective under the scheduling order and under the Rules of Civil Procedure. And it's a very simple process for me to understand that the designation on September the 25th occurred after the docket control order cutoff on July 21st . . . .

So . . . there are a lot of things . . . that you could have done before proceeding in the matter. And I'm sure many of them occur to you just as they occur to me. But none of those are relevant this morning. All that's relevant is whether or not your designation of September the 25th of Dr. Milam was effective within the light of the scheduling order. And the Court finds that it was not effective because it was well after the deadline for the respondent to designate an expert.

Later, at the November 27, 2006, hearing on the motion for continuance, the trial court explained that Mitchell could have filed a response to the State's motion to strike his expert-witness designation, or a motion, but he failed to do so:

I very carefully crafted the Court's order simply to say it was not an effective designation. I hoped that would be a clue that all you had to do was file a motion to late designate, give them the 10 days' notice, such that the Court then could go forward and have a hearing, let you make your showing on

evidence that you should have more time; and I would have granted you more time.

But you never asked for this, and . . . I couldn't do it sua sponte.

We do not know the circumstances surrounding the State Counsel for Offenders' failure to designate an expert witness. The trial court had previously granted Mitchell's request to appoint consulting experts and authorized payment for the services upon the court's approval. When the expert-witness designation was filed late, the court followed the scheduling order and implicitly found that the change of attorneys, without more, was insufficient to permit the late designation. Mitchell was never without representation by an attorney. His attorney did not file any written motion that explained why the expert-witness designation was late and that requested permission to extend the scheduling-order deadline. The trial court judge indicated his refusal to allow the late designation was based on the lack of a motion, with notice or hearing, that established Mitchell's entitlement to more time. In a matter within the discretion of the trial court, the fact that an appellate court would decide a matter differently under circumstances like those presented does not by itself establish an abuse of discretion. See generally *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). Issue two is overruled.

In issue three, Mitchell argues the trial court erred in denying his objection to the jury charge. He asserts the instruction to the jury did not

include lack-of-control and future dangerousness findings, and thereby violated his due process rights. This Court has previously ruled that the broad-form question, such as the one submitted to the jury in this case, encompasses a lack-of-control finding. See *In re Almaguer*, 117 S.W.3d 500, 505-06 (Tex. App.--Beaumont 2003, pet. denied); see also *In re Commitment of Browning*, 113 S.W.3d 851, 862-63 (Tex. App.--Austin 2003, pet. denied).

The jury charge defines "behavioral abnormality" and "predatory act" and follows those definitions with the broad-form jury question:

"Behavioral Abnormality," means a congenital or acquired condition that, by affecting a person's emotional, or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.

"Predatory Act," means an act that is committed for the purpose of victimization and that is directed toward:

(A) a stranger;

(B) a person of casual acquaintance with whom no substantial relationship exists; or

(C) a person with whom a relationship has been established or promoted for the purpose of victimization.

Question One

Do you find that Todd Mitchell suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence?

In asking the jury if Mitchell has a behavioral abnormality that makes him likely to engage in predatory acts of future violence, the jury question, along with the definitions, encompasses a finding of future dangerousness. "A trial court does not err in refusing to submit an instruction on the law which is already encompassed in the instructions and question." *Almaguer*, 117 S.W.3d at 506. We overrule issue three.

In issue four, Mitchell argues the 221st District Court in Montgomery County did not have jurisdiction to hear the case.[3] Section 841.041(a) provides that the State's attorney "may file, in a Montgomery County district court other than a family district court, a petition alleging that the person is a sexually violent predator . . . ." Tex. Health & Safety Code Ann. § 841.041(a) (Vernon Supp. 2007). Mitchell asserts the 221st District Court hears cases involving family law matters and therefore does not have jurisdiction over a sexually violent predatory case.

The Legislature has designated certain courts as family district courts to have "primary responsibility for cases involving family law matters." See Tex. Gov't Code Ann. § 24.601 (Vernon 2004). Other district courts have

concurrent jurisdiction to hear cases involving family law matters. See id.; see also Tex. Const. Art. V, § 8 (jurisdiction of district courts). The Legislature has not designated the 221st District Court in Montgomery County as a family district court. See Tex. Gov't Code Ann. §§ 24.601-24.640 (Vernon 2004 & Supp. 2007). Filing the petition there does not fall within the prohibition in section 841.041(a) against filing a sexually violent predator case in a "family district court."

Mitchell cites section 24.579, the statute creating the 435th Judicial District in Montgomery County. See Tex. Gov't Code Ann. § 24.579 (Vernon Supp. 2007). The statute provides in part, as follows:

(1) The 435th Judicial District is composed of Montgomery County.

. . . .

(b) The 435th District Court shall give preference to:

(1) civil commitment proceedings under Chapter 841, Health and Safety Code;

(2) criminal cases involving offenses under Section 841.085, Health and Safety Code, and Article 62.203, Code of Criminal Procedure; and

(3) other matters that may be assigned by the administrative judge.

Section 24.579 does not give the 435th District

Court exclusive jurisdiction over sexually violent predator cases; it provides that the Court shall give preference to Chapter 841 proceedings. Further, the Legislature created the 435th District Court after the trial court adjudicated Mitchell as a sexually violent predator. The 221st District Court had jurisdiction over this case. Issue four is overruled.

The trial court's judgment is affirmed.

AFFIRMED.

/s/ DAVID GAULTNEY
Justice

Submitted on December 13, 2007

Opinion Delivered March 20, 2008

Before Gaultney, Kreger, and Horton, JJ.

[1]. Furthermore, on this record we are not persuaded the testimony in the sexually violent predator context would be relevant, admissible, or subject to a subpoena.

[2]. Shortly after the State filed its petition, Mitchell requested appointment of counsel on grounds of indigency. The trial court granted his request, and State Counsel for Offenders provided representation until retained counsel appeared.

[3]. Mitchell also asserts venue was improper in the 221st District Court. However, he did not file a motion to transfer venue in the trial court and

cannot raise that issue now. See Tex. R. Civ. P. 86(1) ("An objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other pleading or motion except a special appearance motion provided for in Rule 120a.").

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 08-0495
COA [illegible]-0002-CV

STYLE: IN RE [illegible] COMMITMENT OF [illegible] MITCHELL

Don't mess with Texas

UNITED STATES POSTAGE
$ 00.27⁰
0004392386 SEP 26 2008

Today the Supreme Court of [illegible] the petition for review in the above-referenced case.

MAIL TO:

MR. SCOTT HOWARD PAWGAN
300 W DAVIS STE 540
CONROE TX 77301

BEST AVAILABLE COPY